

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

ROSALYN ALLEN ECHOLS,)
)
Employee/Grievant,)
)
v.)
)
DEPARTMENT OF SERVICES FOR)
CHILDREN, YOUTH AND THEIR)
FAMILIES,)
)
Employer/Respondent.)

DOCKET No. 09-10-456

DECISION AND ORDER

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on March 24, 2010 at the Delaware Public Service Commission, Silver Lake Plaza, Canon Building, 861 Silver Lake Boulevard, Dover DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, and Jacqueline Jenkins, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Maggie Clausell, Esquire
on behalf of Employee/Grievant
Rosalyn Allen Echols

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Services for Children, Youth
and Their Families

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument on the motion by the Department of Services for Children, Youth and Their Families (DSCYF) to dismiss the appeal for lack of jurisdiction. DSCYF attached nine exhibits (A-I) to its motion to dismiss. At the hearing, the Board admitted another DSCYF exhibit (J) into evidence.

FINDINGS OF FACT

“On a motion to dismiss, all well-pleaded factual allegations are accepted as true” and the Board “must draw all reasonable inferences in favor of the non-moving party.” *Lynch v. Mandrin Homes of Delaware, LLC*, C.A. No. S09C-12,008-RFS, 2010 WL 780104, at p.2 (Del. Super., Mar. 9, 2010).

The employee/grievant, Rosalyn Allen Echols (Echols), works for DSCYF as a Family Crisis Therapist. On August 8, 2008, her supervisor, Linda Payne, gave Echols a written reprimand. Payne sent the letter of reprimand to Echols by regular U.S. mail.

Echols alleges she did not receive that letter until August 25, 2008. DSCYF claimed that was because Echols did not regularly check her mailbox at work. For purposes of DSCYF’s motion to dismiss, the Board must accept Echols’ allegation as true, so the Step 1 grievance she filed on September 1, 2009 was timely. *See* Merit Rule 18.6 (fourteen days from the date of the grievance matter).

Echols had a Step 1 meeting with her supervisor, Linda Payne, on September 10, 2009. DSCYF did not produce a copy of the Step 1 decision, so the Board will accept as true Echols’ allegation that she filed a timely Step 2 grievance on September 25, 2009.

The Step 2 meeting was on October 17, 2008. The Step 2 hearing officer’s decision was

dated October 28, 2008. According to a handwritten notation, the hearing officer's secretary "mailed" Step 2 decision to Echols but it is not clear whether that meant regular U.S. or another form of mail. On December 16, 2008, Echols appealed to the Director of the Office of Management and Budget (OMB).¹

The Step 3 hearing officer e-mailed his decision to Echols on March 25, 2009. Echols claims she filed a timely appeal to the Board on April 13, 2009 within the twenty days required by Merit Rule 18.9. According to Echols, she faxed the appeal to the MERB office on April 13, 2009 (a Monday) from her personal computer at home.

After six months without hearing anything, Echols called the MERB office in October 2009 to learn that the Board did not have any record of receiving her April 13, 2009 faxed appeal. Echols filed another appeal with the Board on October 15, 2009.

According to Echols, she called the Board office in April 2009 to get the fax number. According to Echols, on April 13, 2009 she faxed her appeal to that number from her home computer with help from her husband.

According to the Board Administrator, she checked the MERB office and files in October 2009 after Echols called about the status of her appeal. The Administrator could not find any record of an appeal received from Echols. According to the Board Administrator, in April 2009 a casual/seasonal employee, Eunice Craig, worked for the MERB and was in the office on April 15 (Wednesday), 16 (Thursday), and 21 (Tuesday), 2009. According to the Board Administrator, it was Ms. Craig's practice each day she was at work to check to see if any new appeals were received at the MERB office. It was then Ms. Craig's practice to immediately docket a new appeal indicating

¹ DSCYF contends that Echols did not file a timely' Step 3 appeal because under Merit Rule 18.8 she had fourteen days to appeal to the Director. Echols did not have any explanation for the gap between the Step 2 decision (October 28, 2008) and her Step 3 appeal (December 16, 2008). The Board does not have

the date of receipt.

CONCLUSIONS OF LAW

Merit Rule 18.9 provides:

If the grievance has not been settled, the grievant may present, within 20 calendar days of receipt of the Step 3 decision or the date of the informal meeting, whichever is later, a written appeal to the Merit Employee Relations Board (MERB) for final disposition according to 29 Del. C. 5931 and MERB procedures.

“An appeal is not perfected to the Board until the written appeal is actually received by the Board’s Administrator.” *Pinkett v. DHSS*, MERB Docket No. 08-02-415 (May 21, 2009). As the party moving to dismiss for lack of jurisdiction, DSCYF has the burden to prove that the Board did not receive Echols’ appeal within twenty calendar days of the Step 3 decision (by April 14, 2009). “[I]t was not the plaintiff who had to prove receipt, but the defendant who had to prove the absence of receipt.” *Laouini v. CML Freight Lines, Inc.*, 586 F.3d 473, 477 (7th Cir. 2009).

In *CML Freight Lines*, an employee (Laouini) had his attorney file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) by fax on April 12, 2007, the last day for a timely filing. “A transmission record from counsel’s fax machine confirms that he successfully faxed some document to the agency that day, but there is nothing in the agency’s files evidencing receipt of counsel’s fax.” 586 F.2d at 474. The employer moved to dismiss the charge of discrimination as time-barred.

Laouini’s attorney submitted an affidavit “that on April 12, 2007, he instructed his assistant to prepare a fax cover sheet to the EEOC and that either he or his assistant faxed that cover sheet and Laouini’s two-page administrative charge to the agency’s Indianapolis office that day.” *Id.* Laouini

to resolve this question because Echols did not file a timely appeal to the Board.

also submitted copy of a printout from counsel's fax machine confirming that a three-page document had been successfully transmitted to the Indianapolis fax number at 4:05 p.m. on April 12, 2007."

Id.

"An affidavit from the supervisor who oversees charge-processing at the [EEOC's] Indianapolis office confirms that the office accepts charges of discrimination by fax and that the number on counsel's fax transmission is indeed the fax number attorneys are instructed to use for submitting charges. The supervisor also states that charges faxed before 4:30 p.m. are deemed filed as of that day." *Id.* at 475. The EEOC affidavit stated "that there was no evidence in the case file indicating that Laouini's charge had been received on April 12" and that "the only copy of the charge in the file was the one mailed on April 12 and received on April 15." 586 F.3d at 475.

The employer argued that the charge of discrimination was untimely because "proof that a message has successfully exited one fax machine is not proof that the message was successfully received by another fax machine." *Id.* at 476. The employer "contends that because Laouini submitted no other evidence that the fax was received on April 12, no reasonable factfinder could conclude that the charge was timely." *Id.*

The court held that "a fax confirmation generated by the sender's machine creates a rebuttable presumption that the fax was received by the intended recipient." *Id.* "One significant advantage the fax has over other forms of data exchange is that the sender immediately knows if the transmission was successful. All fax machines have the capability to print a fax confirmation sheet after each fax sent. This sheet confirms if the fax has been successfully transmitted." *Id.* at 478.

The employer did not offer any "evidence to meet its burden of proving non-receipt." *Id.* The EEOC did not deny "ever having receiving the fax" but "simply offered up Laouini's file, which does not contain a faxed copy of the charge of discrimination." *Id.* The employer "did not produce

any evidence from the EEOC about its internal fax-handling and retention policies.” *Id.* “A bureaucratic officer’s uninformed belief that a document was not received is no more conclusive than a fax-transmission record indicating that it was.” *Id.* at 478-79. The EEOC could have received the charge “but simply lost, misplaced, or otherwise failed to timely process it.” 586 F.3d at 479.

In contrast, DSCYF presented evidence about the MERB’s internal handling of incoming appeals and docketing policy to show it was highly unlikely that Echols’ faxed appeal was received at the MERB office on April 13, 2009 and then lost or misplaced. Echols does not have a fax confirmation sheet to show the date and time and fax number to which she sent her appeal, so there is no rebuttable presumption that the Board received her appeal.

Echols waited until the next to last day to file her appeal to the Board. She used a transmission medium with which she was not familiar, and did not print out a confirmation sheet after she sent the fax. Nor did she call the MERB office to verify receipt. ““The party choosing to appeal bears the burden to ensure the receipt of the filing and those who wait until the last day foreclose opportunities to correct mistakes.”” *Pinkett v. DHSS, supra* (quoting *Gasper Township Board of Trustees v. Preble County Budget Commission*, 893 N.E.2d 136, 142 (Ohio 2008)).


The Board concludes as a matter of law that Echols did not file a timely appeal to the Board.

DECISION AND ORDER

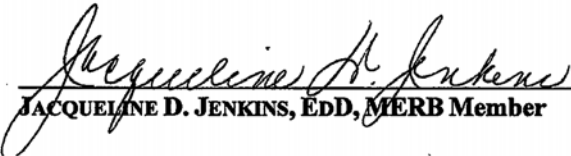
It is this 5th day of April, 2010, by a unanimous vote of 3-0, the Decision and Order of the Board to deny Echols' appeal for lack of jurisdiction.



Martha K. Austin, MERB Chair



JOHN F. SCHMUTZ, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: April 5, 2010

Distribution:

Original: File

Copies: Grievant's Counsel
Agency's Representative
Board Counsel